Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,
Petitioner,

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; JEFF WINHOLT, M.D.; DEACONESS HOSPITAL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the highest court of the State provides a "right" to its citizens to have a jury be informed of possible bias as to whether medical malpractice witnesses who testify at trial have a "commonality of insurance" interest with the defendant can that substantive right be abolished by the "discretion" of the federal trial court who rules that such may "prejudice" the jury under F.R.Evid. 403?

2. Whether this Court should invoke its' supervisory power to protect the process of orderly trials where the Circuit Court finds "no doubt" that defense counsels' trial conduct was improper (e.g. personal attacks on plaintiffs' counsel [being called "the devil"; "offensive, distasteful;" "disgraceful;" {guilty of} "creative lawyering;" and being accused of withholding evidence from the jury]) and the Court finding characterizations were made "frequently" and "the comments were crucial to the central issue before the jury;" yet the Circuit Court by its affirmance rewards unprofessional trial conduct and conflicts with another Circuit and state courts.

3. Whether the local practice (utilized in this case) of choosing the number of alternate jurors based upon the expected length of the trial; then converting the alternate jurors into the final jury (and not dismissing them) thereby violates the Constitutional rights of a plaintiff in requiring plaintiffs to unanimously convince a larger number of jurors based solely on the anticipated length of a trial.

4. Is a citizen's right to their loved one's body [as recognized in Brotherton v. Cleveland, 923 F.2d 477 (1991)] violated when a state statute provides a "good faith" immunity to those involved in human tissue and organ "harvesting" when arguendo they merely ask for donation "for any purposes authorized by law" without further explanation and they then completely remove not only the consented human body parts (corneas and inner ear bones), but further "harvest" the decedent's eyeballs; remove ten (10) sections of decedent's skin and completely remove decedent's long leg bones (femurs).

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OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Sixth Circuit, decided August 29, 1997 is annexed hereto as an appendix. Also annexed as an appendix in an order of the United States Court of Appeals for the Sixth Circuit, dated October 9, 1997 which denied petitioner's petition for a rehearing.

JURISDICTION

(a) The judgment of the trial court was entered on September 8, 1995, as a result of a wrongful death medical negligence case brought pursuant to 42 U.S.C. 1332 due to diversity jurisdiction of the parties. The Magistrate Judge denied post trial motions for new trial and NOV on January 3, 1996.

(b) The judgment of affirmance of the United States Court of Appeals for the Sixth Circuit is dated August 29, 1997.

(c) The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing is dated October 9, 1997.

(d) Jurisdiction to review the judgment in this question by certiorari is conferred by Title 28 U.S.C. Section 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

"No person shall....be deprived of life, liberty, or property, without due process of law."

Federal Rule of Evidence 403:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations or undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Civil Procedure 48:

"The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

The syllabus of Ohio law as stated in Ede v. Atrium South OB-GYN, Inc., (71 Ohio St.3d 124).

> "In a medical malpractice action, evidence of a **commonality of insurance interests** between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause."

Ohio Revised Code Section 2108.08: Immunity.

"A person who in good faith acts, or attempts to act, in accordance with section 2108.01 to 2108.12 of the Revised Code, or the anatomical gift laws of another state, is not liable for damages in any civil action or subject to prosecution in any criminal proceedings for his act.

STATEMENT OF THE CASE

Basis Of Jurisdiction In First Instance

The district court below was presented with a diversity case involving a wrongful death medical negligence case pursuant to 28 U.S.C. 1334. The decedent was a resident of Michigan (and where his estate and its representative (the widow) reside and all defendants were residents of the State of Ohio. Pursuant to 28 U.S.C. 636(c) and Fed. R. Civ. Pro. 73(b), the parties consented to the jurisdiction of U.S. Magistrate for final judgment and that an appeal from the Magistrate's judgment would lie directly to the Court of Appeals for the Sixth Circuit.

Statement Of Facts

This is a wrongful death medical negligence case. A complaint was filed by the widow/administratrix of the estate against orthopedic surgeon, Dr. Noyes, (and his medical corporation), the anesthesiologist; and the hospital.

Decedent, William Gleason, was a 62 year old schoolteacher, father of four, Boy Scout master from Detroit, Michigan. He underwent a total knee replacement operation by defendant orthopedist in November, 1991. He was a "high risk" for deep vein thrombosis and subsequent pulmonary

embolism. Defendant orthopedic surgeon called in a specialist to handle decedent's blood thinning even prior to undertaking the first procedure. However, defendants failed to call in any such specialist for the subsequent two orthopedic procedures (January and February, 1992) performed on decedent by defendants. Several hours after the last procedure, decedent suddenly complained of shortness of breath and then became completely unresponsive and was pronounced dead due to pulmonary emboli (blood clots to the lungs).

Plaintiff's experts testified that had decedent's medical condition and blood clot been appropriately recognized, standard of care treatment would have prevented the subsequent pulmonary embolism which took Gleason's life. Testimony was that Gleason's chances of survival, if properly treated, was "as close to 100% as you can get." [R.41, T.p. 474-475]. [Even defendant's expert, Dr. Kennealy's statistics showed 92% of patients survive when treated. [R.54, T.p.1785].

Organ-Tissue "Harvesting"

Shortly after the death defendant hospital called Mrs. Gleason in Detroit. They asked her if she wished to make any anatomical gifts from her husband's body. She said she would agree to donate her husband's inner ear bones (someone in her family had a hearing deficit) and she would donate the corneas (the thin layer of cells on the outer part of the eye). But nothing else. However, when the body arrived back in Michigan Mrs. Gleason was shocked and quite distressed when the undertaker said that they could not guarantee an open casket. The hospital had permitted anatomical harvesting of not only the "consented" inner ear bones and corneas; but permitted the entire enucleation of

both eyeballs; ten (10) skin graft removals; and removal of the both femurs bones (the large thigh/leg bone) to be "harvested" from decedent's body. The undertaker said that they needed about 5-6 people to carry the body-bag because the body lacked stability.

ARGUMENT

1. When the highest court of the State provides a "right" to its citizens to have a jury be informed of possible bias as to whether medical malpractice witnesses who testify at trial have a "commonality of insurance" interest with the defendant can that substantive right be abolished by the "discretion" of the federal trial court who rules that such may "prejudice" the jury under F.R.Evid. 403?

The Ohio Supreme Court's syllabus [which is the "law" of Ohio] in Ede v. Atrium South OB-GYN, Inc., (1994) 71 Ohio St.3d 124, states:

> "In a medical malpractice action, evidence of a commonality of insurance interests between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause."

In the case sub judice, at least two of defendants' experts had a "commonality of insurance" with the defendant. The trial court herein refused to follow the syllabus of Ohio law as stated in Ede and refused to permit plaintiff to inform the jury of this "commonality of insurance interests" between the experts and defendant. The court utilized Federal Rule of Evidence 403 to abrogate substantive Ohio law!

A federal court is to apply state law whether "declared by its Legislature in statute or by its highest court." (Erie R. Co. v. Thompkins, (1938) 58 S.Ct. 817, 822, 304 U.S. 64,78, 82 L.Ed. 1188.

Here the Supreme Court of Ohio in Ede specifically adopted a state rule to effectuate an substantive policy of the State; i.e. to permit jurors the knowledge of possible bias or prejudice of an expert witness. Ohio's highest court clearly recognized in its decision the inequity created by withholding from the jury information which impacts directly on their main function, i.e. weighing the credibility of an expert's testimony. The Supreme Court of Ohio certainly recognized the "conspiracy of silence" which permeates medical negligence cases and created this rule. (See: Trull v. Long, (1993), 621 So.2d 1278). The Ohio Supreme Court has subsequently continued to cite Ede as precedent; viz: (Johnston v. University Mednet, (1995), 71 Ohio St.3d 608, 646 N.E.2d 453); Davis v. Immediate Medical Services, Inc. (1997), 80 Ohio St.3d 10, 684 N.E.2d 292).

It is important to note that the Court in its syllabus did not simply defer the decision back onto the trial court's "discretion" on a case-by-case basis; but it affirmatively set forth the law which judges must follow if the facts present themselves. This decision is important in that it clearly is not a question of "discretion" but is a question of substantive law of Ohio to be applied.

This error would be prejudicial enough in an ordinary case; however, as the Circuit court clearly noted in this case, "the central issue before the jury, ...was whose experts were more credible." [p.3 of Circuit opinion].

Here the focus of the defense strategy was to attack the

plaintiff's experts at all costs. Assail the plaintiff's attorney personally and each plaintiff expert. The jury certainly should have been able to have information as to any possible bias, prejudice on the part of defense witnesses.

Defense counsel repeatedly stressed "credibility" of plaintiff's experts in closing argument. Clearly, bias or prejudice of defense witnesses was essential in providing a fair trial.

Defense counsel's closing argument stressed:

> "..Consider credibility of Dr. Berger, a hired expert" [T.p.2613]...."credibility...which one of those three would YOU feel comfortable with going to to establish a doctor-patient relationship?" [T.p.2614]

As this Sixth Circuit panel recognized, the main issue for jury determination was "whose experts were more credible." [Circuit opinion, p.3]. Therefore, the matter of "commonality of insurance" (bias) was crucial to a fair consideration by the triers of fact. It was plain error for the trial court to refuse to follow the law of Ede and provide the full measure of Ohio law to plaintiff.

Further, the decision sub judice on this basic issue is in conflict with the Eighth's Circuit's Charter v. Chleborad, M.D., 551 F.2d 246 (CA8, 1977). The Charter court in reversing the identical trial court's ruling held:

> "In our opinion the probative value of the evidence far outweighs any danger of unfair prejudice.... Plaintiff's claim rested for the most part on the credibility of his expert

witness....Considering the importance of expert testimony in this case we cannot conclude that the trial court's exclusionary ruling was mere harmless error." [at p.249].

A federal court should not be permitted to abrogate substantive State-created rights in the guise of evidentiary rulings. This critical issue in cases of substantial rights of litigants in medical negligence cases needs clarification throughout this country's Bench and Bar to promote fair trials.

2. Whether this Court should invoke its' supervisory power to protect the process of orderly trials where the Circuit Court finds "no doubt" that defense counsels' trial conduct was improper (e.g. personal attacks on plaintiffs' counsel [being called "the devil"; "offensive, distasteful;" "disgraceful;" {guilty of} "creative lawyering;" and being accused of withholding evidence from the jury]) and the Court finding such characterizations were made "frequently" and "the comments were crucial to the central issue before the jury;" yet the Circuit Court by its affirmance rewards unprofessional trial conduct and is contrary to other Circuits and this Courts historical protection.

Here the Sixth Circuit found:

"We have no doubt that several of the comments by defense counsel were improper. First, the attorneys personally vouched for the veracity of their clients' case and against the validity of Barbara Gleason's; they engaged in personal attacks on plaintiff's counsel; they insinuated that plaintiff's experts had fabricated their testimony; and they argued evidence which was not in the record. Second, these

comments were crucial to the central issue before the jury, which was whose experts were more credible. Fourth, since Barbara Gleason offered sufficient evidence from which to conclude that her husband's death could have been prevented through different prophylactic measures, the case was close and could have been affected by defense counsel's improper conduct. Fifth, the no-cause verdicts are consistent with jury prejudice." [p.3-4 Circuit opinion, see appendix]

The Circuit court, however, concluded that since plaintiff's counsel did not object to each repeated defense infraction, such precluded the court from reviewing the claimed error, on any basis other than the "plain error" rule.

Nonetheless, even under the "plain error standard" the court found that "it was probably 'clear and obvious under current law' that defendants should not have been allowed to make some of the statements complained of, plaintiff's failure to object requires her also to show that the improper argument prejudicially affected the outcome of the trial." [p.5 Circuit opinion]

Inexplicably, and illogically, the Circuit court then concluded that since the verdict was "supported by the evidence," the verdict was affirmed. This is, if not absolutely contradictory, at least illogical, considering the court's own findings that defendants' misconduct was "crucial to the central issue before the jury."

It is now commonplace in this type of litigation, that when defense is concerned about losing the case, they "go for broke" in the closing with "no holds barred." In the repeated litany of improper conduct, objections to such comments are not capable of "un-ringing" the bell of such comments in the minds of the jury. Additionally requiring plaintiffs to

continually object buttressed the sought impression with the jury that plaintiff is trying to keep matters from the jury. The worst that can happen - a mistrial. They then avoid a bad result and then have the advantage of causing plaintiffs the Herculean task of re-financing another trial. Heads I win, tails you lose! Without court intervention, this abuse will continue to occur and deny justice.

One of the three defense counsel herein has been ethically reprimanded by the Sixth Circuit in **Abrahamsen v. Trans-State Express**, (6th Cir., 1996), 92 F.3d 425, 35 Fed.R.Serv.3d 840. The Court found said counsel's "bad faith during discovery" led to the "further misconduct" where he "committed the even worse sin of knowingly putting on Reagan's false testimony." The Court specifically noted that this counsel's course of conduct:

> "show contempt for the rules of discovery and violate the trust placed in counsel to obey the fundamental rules of court. In doing so, counsel prevented the Plaintiffs from fully and fairly presenting their case."

The court remanded the case back to the trial court for consideration of even further sanctions against said defense attorney. This same counsel has also recently been recommended to be suspended from the practice of law in the State of Ohio for a period of six months for ethical violations during litigation. [findings of the Board of Commissions on Grievances and Discipline of the Supreme Court of Ohio contained in Appendix].

However, the verdict against the claims of this widow stands for the proposition that such conduct is well worth the risk most of the time. Here as the Sixth Circuit noted the

unprofessional tactics provided a significant defense victory. Until the courts demand professional and ethical trial conduct, some members of the trial bar will continue to utilize unethical and unprofessional conduct that not only produce individual injustice for a single litigant, but also diminish the entire profession and legal system in the eyes of the public. This Court has consistently had a historical hand in maintaining the stature expected in the federal courts of this land. (See: Sacher v. United States 343, U.S. 1, 72 S.Ct. 756 (1952); Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935).

From the time of opening statement to closing argument the defense was a unified attack, taking every pot-shot against plaintiff's counsel available. All three defense counsel are experienced trial attorneys and cannot claim naivete. Even in opening statement the court cautioned defense counsel as to violating the "golden rule." Defense counsel know full well that once they get these comments out before the jury no number of objections or instructions will be able to erase these violations from the jury's minds. The old saying that one cannot "un-ring" a bell can never be more appreciated than in situations like this where defense counsel blurts out defendant doctor has "never had a patient die"; "has the lowest morbidity rate of any orthopedic clinic in the United States of America", etc. One cannot seriously expect a cautionary instruction to be of any realistic good. This "realistic" fact has been previous recognized in City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, (CA6, 1980) this court noted: "As the Fifth Circuit has so accurately observed:

> "...the bench and bar are both aware that cautionary instructions are effective only up to a certain point. There must be a line drawn in

any trial where, after repeated exposure of a jury to prejudicial information... cautionary instructions will have little, if any, effect in eliminating the prejudicial harm. (O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1309 (5th Cir. 1977).'"

Defense counsel repeatedly talked of not being "guilty of malpractice" while the law of Ohio is that it is clearly reversible error to convey such is a standard to the jury. (Kyle v. Fok, (1969), 18 Ohio St.3d 70, 247 N.E.2d 457; Bahm v. The Pittsburgh & Lake Erie Rd.Co., (1966), 6 Ohio St.2d 192, 217 N.E.2d 217).

Likewise, It is improper for an attorney to express his personal belief or opinion on the case. (ABA Code of Professional Responsibility, Cannon 7, Disciplinary Rule DR 7-106(C)(4) of the Code of Professional Responsibility; State v. Smith, (1984), 14 Ohio St.3d 13, 470 N.E.2d 883). However, the hospital's attorney expressed to the jury: "I believe the anatomical gift donation issue was a side issue..."

Contempt for our justice system was rampant throughout this litigation. As the testimony showed, prior to deposition, defense counsel met with the physical therapist to inform her: "your note is the problem" with this case. She testified that it was "then" that she decided she had made a charting "error." She meant to write "suprapatellar" (the area just around and above the knee); and she did not mean to write "thigh." The trial court even commented "That's a question of whether anybody is going to believe any of her testimony."

Another defense tactic occurred in the deposition of defendant anesthesiologist. Plaintiff's counsel requested to

see documents he reviewed in preparing for the deposition including the large three-ringed binder in front of the witness. He admitted it was a binder of medical articles given to him by the defendant-orthopedic surgeon. Contrary to the rules of discovery, defense counsels refused to permit plaintiff's counsel to see the binder. Eventually plaintiff had to file a motion to compel which resulted in a different binder being produced, (even though plaintiff had requested the original be preserved).

The outright disregard for the system was further demonstrated during a deposition of Dr. Craig Roberts, (one of the resident physicians) who claimed he "did not understand" terms such as : "medical "specialty"; "medical residency"; or a "definition of orthopedic surgery."

A defense witness, Dr. Miller, gratuitously commented to the jury that if defendants did what plaintiff's experts said "we'd be here in another lawsuit."

Even though the trial judge forewarned counsel to make simple objections, defense made countless "speaking objections" which were mini-lectures to the jury. In fact at one point, the court admonished defense counsel "I don't want you to give a lecture in front of the jury."

Even though in closing argument it is improper to express personal belief or opinion; to attempt to appeal to passion and prejudice; or to berate opposing counsel, (Ethical Consideration 7-37) defense counsel's closing began:

> "The remarks by Mr. Metz...I take great resentment. I think that to turn this case into a mud slinging, conspiratorial, finger pointing, record changing conduct on the part of these medical providers **I FIND OFFENSIVE,**

> **DISTASTEFUL, and as I think you will see, IT'S ABSOLUTELY INCORRECT.** ....If there is any conspiracy...attempt to create something out of nothing...it is on the part of PLAINTIFF'S EXPERT WITNESSES."

Defense counsel continued: "You're intelligent....I know you understand it...You are smarter than **Mr. Metz** is giving you credit for." (Alvarez v. State, 574 So.2d 1119 (Fla.App. 1991, "insult to intelligence" - improper).

It is improper closing argument to attack opposing counsel's honesty or integrity (Code of Professional Responsibility, Ethical Consideration 7-37). However, one defense counsel continued to attempt to paint a picture of dishonesty for the jury and personalized the attack toward plaintiff's counsel. He referred to the medical chart in such a spirit: "...They're not made for lawyers **LIKE MR. METZ**.....conspiracy.. is outrageous and is absurd. It's ridiculous."

Defense counsel tried to make the jury indignant against plaintiff's counsel, by saying:

> "..this is a serious allegation. ..he [Metz] has stood up in this courtroom, and **he has pointed his finger** at Frank Noyes, and he said: 'You caused the death of William Gleason,' the only patient that Dr. Noyes has ever lost....**in 3-1/2 weeks there hadn't been ONE RECOGNITION BY THIS LAWYER, NOT ONE, THAT JUST MAYBE THAT DR. NOYES and his staff....FEEL BAD ABOUT LOSING THIS MAN. NOTHING."**

"They tried to create some kind of monster, some kind of corporate monster...he is a human being and he lost ONE PATIENT, ONE TIME."

At this point the jury would be incensed if plaintiff's counsel did not come out and apologize to defendant! Defense counsel put in the jury's mind that plaintiff's counsel is evil for not being "sympathetic" to Dr. Noyes! This type of inflammatory argument is not proper in a court of law. It has nothing to do with the evidence, but has only one purpose: to denigrate opposing counsel in the eyes of the jury.

While "great latitude" is permitted in closing argument, counsel may not be abusive to a witness to excite the passion of the jury against a witness and say the witness is lying. (Webster v. Rees, 729 F.2d 1078 (CA6, 1984); United States v. Cooper, 827 F.2d 991 (CA4, 1987). It is improper to imply a witness has fabricated or contrived his testimony. (State v. Rose, 112 N.J. 454, 548 A.2d 1058 (1988).

Nonetheless, in reference to plaintiff's internist-expert, defense counsel stated: "Now, now the creation begins." Defense referred to plaintiff's expert as "those people that THEY have characterized as experts...with that complete lack of background."

Where counsel calls into question the integrity of a witness during closing argument which is not supported by evidence, the trial court is required to intervene so as to prevent further improper argument (Plas v. Holmes Constr. Co., (1952), 157 Ohio St. 95, 47 O.O. 86, 104 N.E.2d 689). No objection is or should be necessary under such circumstances. (Igo v. Coachmen Industries, Inc., 938 F.2d

650, 33 Fed.R.Serv. 871, (CA6, 1991)).

Defense counsel in discussing his experts commented: "These are not people that we dragged in from some expert service from San Francisco or Florida" [referencing plaintiffs' experts]. "Mr. Metz was contacted..Record reviewed with a fine-tooth comb..and then he calls Ellen Rieback.....she's this expert BROKER that's been referred to.....**SHE CANVASSES THE COUNTRY TO FIND SOMEONE, ANYONE, WHO CAN FIND SOMETHING OR ANYTHING.**" Plaintiff's counsel DID object and was summarily "overruled" which was more indication that the court would indeed permit such argument, even lacking evidentiary foundation.

Defense counsel remarked to the jury, without any foundation in the record, that plaintiff's expert's opinion that he "probably came up with it while he was on the airplane on the way to the trial."

Counsel was not subtle in disparaging opposing counsel, the judicial process and the witness's credibility:

> "**I think typical in many cases, you know, LAWYERS TRY TO THROW A LOT OF MUD ON THE WALL AND ARE HOPEFUL THAT MAYBE A LITTLE BIT OF IT WILL STICK. THEY SAY A PRAYER AND CROSS THEIR FINGERS. AND I THINK THAT'S WHAT WE HAVE HERE WITH THESE, WHAT I CONSIDER SPURIOUS, ALLEGATIONS THAT HAVE NO FOUNDATION.** .....Consider [the] credibility of Dr. Berger, A HIRED EXPERT."

The court in Calloway v. Lemley, 382 So.2d 540 (Ala.1980) found reference to expert witness as a "hired gun" to be improper argument. [Accord: Spisas v. State, 102 Nev. 119, 716 P.2d 231 (1986)].

Defense counsel twice implores the jury "Let's be fair here. Let's be fair" implying that plaintiff (or this process) is not being "fair."

Defense counsel were relentless in continuing the improper and personal attack against opposing counsel, saying:

> "**Mr. Metz** has presented this case... in a very strange manner. **Mr. Metz** ...named 50 authors....WHY AREN'T ONE OF THEM IN HERE...BECAUSE THEY AGREE WITH DR. NOYES." [R. 62, T.p. 2566]

Clearly here for defense counsel to suggest that because plaintiff did not bring in every "authoritative" author referred to throughout the trial that they were all in favor of defense is not only improper, but further defeats the entire policy of **Evid. R. 813(18)**. It is improper to for counsel in argument to refer to the opposing party's failure to call a witness where the witness is equally available to either party (Smith v. Covell, 100 Cal. App.3d 947, 161 Cal. Rptr. 377 (1980); Bank v. Cunningham, 674 S.W.2d 561 (Mo.App. 1984)); particularly improper where there is nothing in the record to indicate that such witness(es) would have been adverse. (Biruk v. Wilson, (1967), 50 N.J. 253, 234 A.2d 225). Before a party can properly argue an inference of unfavorable testimony from a missing witness, the party must establish the witness was peculiarly within the adversary's power to produce. (Chicago College of Osteopathic Medicine

v. George A. Fuller Co., (1983,CA7 Ill) 719 F.2d 1335, 14 Fed. Rules Evid. Serv. 635, appeal after remand (CA7 Ill) 776 F.2d 198, later proceeding (CA7 Ill) 801 F.2d 908, 5 F.R. Serv.3d 1242).

Plaintiff's counsel was even made out by defense attorney to be satanic:

> "and when he (Noyes) has to LOOK THE DEVIL IN THE EYE in this courtroom, you talk about conspiracy...Come on."

The name calling was not yet done, defense counsel said:

> "To characterize Dr. Noyes and his clinic as AN ASSEMBLY LINE OPERATION IS DISGRACEFUL AND NOT RIGHT. But don't, don't let **MR. METZ** short change you. Don't let **him** short change you. Rhoda McMahon [physical therapist] being in this lawsuit is **TERRIBLE**. Dr. Winholt, just as bad."

However, in fact, the physical therapist was not a party at trial.

It is clearly improper for argument to "mislead" the jury. However, defense counsel stated: "Mr. Metz stood up here for an hour and talked to you about a pulmonary embolus. He did not die from a pulmonary embolus." This was not only misleading but contrary to defense counsel's own admission in opening statement that "he died very quickly from an acute, huge pulmonary embolism" But again it makes the jury believe plaintiff's counsel and made a false

representation.

Defense counsel sought juror "sympathy" in saying:

> "Dr. Noyes..fighting this lawsuit under these sets of circumstance IS JUST NOT RIGHT."

Hospital counsel told the jury that the allegations "we take very personally." Defense counsel then again (as he did in opening statement) attempt to place a "criminal" cast on the case and infer a higher standard by saying: "NO ONE IS GUILTY....no one is EVEN GUILTY or liable for a bad result." According to the Ohio Supreme Court, use of the word "guilty" in civil damage actions is reversible error. (Kyle v. Fok, supra,; Bahm v. The Pittsburgh & Lake Erie Rd. Co., supra.

Hospital counsel then clearly gives his personal opinion that plaintiff is lying:

> "I can't figure out why Mrs. Gleason would make such an allegation...if really was a mistake, why wouldn't Mrs. Gleason call or why wouldn't Mrs. Gleason call or why wouldn't she write a letter?... **She waited two years and hired a lawyer to sue the hospital.**"

He continued the personal attack and boldly asked the jury to "protect" them:

> "**Mr. Metz has done a fine job of CREATIVE LAWYERING** for his client here in putting on a three-and-a-half week trial, but we're not here to grade the lawyers.

> We're here to render fairness, and we ask you to recognize the truth.....The jury is the hospital's only protection....**WE NEED YOUR PROTECTION**."

Defense closing went beyond any "implication" of untruthfulness of plaintiff's witnesses and created a fictional scenario:

> "The only alleged criticism of Dr. Winholt comes from this Dr. Berger....he comes to you through one of these hiring services where ANY lawyer CAN APPARENTLY call up and say to this Helen Rieback, **"I NEED SOMEONE TO SAY THAT THERE'S GREEN CHEESE ON THE MOON." SHE LOOKS DOWN THE LIST AND MAKES SOME CALLS AND APPARENTLY SAYS, "HEY, I FOUND SOMEONE FOR YOU TO SAY THERE IS GREEN CHEESE ON THE MOON."** ....the quality or lack of the quality of the evidence that Mr. Metz has brought before your.."

Arguing a fictional scenario that is not supported by the record was found to be improper closing argument in Dillon v. Bundy, (1991), 72 Ohio App.3d 767, 596 N.E.2d 500, at 506.

After such a personal "warfare" attack, plaintiff's counsel attempted to begin to respond, however, the trial court foreclosed any retaliation/rehabilitation stating: "settle down now....that's enough from both of you. I'm not going to permit any more discussion of this issue" [T.p.2623] which under the circumstances a response should have been

permitted. So the jury was left with one impression [that of defendants'] while plaintiff's counsel stood with his hands tied behind his back, unable to respond.

During plaintiff's attempt to respond defense counsel stood up in making an objection and remarked in front of the jury "if he wants to talk about how many experts he's consulted and wouldn't come in here, he can do that, too." This was clearly improper and intentionally calculated to inflame the jury and have them falsely speculate that there were other witnesses who refused to testify.

The conduct of trial counsel was addressed by the Supreme Court of Ohio in Jones v. Macedonia-Northfield Banking. Co., (1937), 132 Ohio St.341, 7 N.E.2d 544, at 548:

The proper role of the attorney at the trial table is not that of a contestant seeking to prevail at any cost but that of an officer of the court, whose duty is to aid in the administration of justice and assist in surround the trial with an air conducive to an impartial verdict.....**If the party represented by offending counsel prevails in the verdict and the result has been brought about by the latter's misconduct to the prejudice of the opposing party, a new trial should be promptly granted."**

The Jones Court found "unhesitatingly" that an objection was not necessary to raise the question of misconduct. The Court continued:

> "The judge who presides over a cause is not a mere umpire; he may not sit by and allow the grossest injustice to be perpetrated without interference. It is his duty in the executive

> control of the trial to see that counsel do not create an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice can not be accomplished. It was the duty of the trial court to stop the argument and require counsel to proceed in an orderly and lawyer-like manner."

One would certainly expect that the level of trial counsel would be no less in the federal forum, than that which is expected of the members of the State Bar. However, the Circuit Court's opinion stands for the proposition that trial counsel can be as unprofessional as they wish, and unless there is an objection the courts have no power to correct such misconduct. This is in conflict with the Sixth Circuit's published opinion Igo v. Coachmen Industries, Inc., 938 F.2d 650, 33 Fed.R.Serv. 871, (CA6, 1991) which clearly did uphold the dignity of trial conduct. In Igo the court reversed a verdict where the conduct of counsel was "outrageous" and resulted in a "complete miscarriage of justice." The court noted that opposing counsel **did not object to most** of the offending statements. However, the court held:

> "A trial court cannot sit quietly while counsel inflames the passions of the jury with improper conduct, even if opposing counsel does not object. The trial court should have censured and stopped this conduct." [at p.653].

Other courts have held that character attacks and name calling require a new trial despite lack of a timely objection. (Al-Site Corp. v. Della Croce, 647 So.2d 296 (Fla. App., 1994).

Judge Ford firmly confirmed the judicial view of improper trial counsel conduct in Jones v. Olcese, (1991), 75 Ohio App.3d 34, 598 N.E.2d 853, at p.861:

> "...this type of venomous argumentation has no place in the trial courts of this district, or any other for that matter. It is better left in a landfill that would accept it before the oracle who wishes to voice it crosses the threshold of a hall of justice. Attorneys who practice in the field in question here are not endowed with special privileges to engage in such excesses! Civility remains the hallmark of professionalism!"

The Eighth Circuit in Kroger Grocery & Baking Co. v. Stewart, 164 F.2d 841 (CA8, 1947) stated:

> The attitude of this Court and of other federal appellate courts toward the interjection of irrelevant personalities and appeals to prejudice or passion in final argument, has been so clearly stated in many cases as to call for no further discussion. New York Central R. Co. v. Johnson, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 [citations omitted]....This Court, in the interest of an orderly administration of justice, will continue to do all that reasonable may be done to assure litigant that a trial in a District Court of the United State shall be so conducted that the verdict of the jury fairly may be assumed to be based upon an impartial consideration of the evidence and the applicable law." [at p.844-45] [emphasis added]

This should be the clear duty of all federal courts throughout all the Circuits.

As the court stated in Hubbard v. McDonough Power Equipment, Inc., 83 Ill.App.3d 272, 404 N.E.2d 311 (1980):

> "The right of trial by jury is not a license for counsel to indulge in abusive behavior, nor does it grant a privilege to embarrass and belittle one's adversary to such an extent that his opportunity of obtaining respectful consideration at the hands of the jury is destroyed or seriously jeopardized."

The U.S. Supreme Court in Sacher v. United States, 343 U.S.1, 72 S.Ct. 756 (1952) made it "clear" in stating:

> "this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. **But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.** [emphasis added]

Our justice system is currently suffering from public ridicule. As did the widow herein, most litigants experience one and only one trial. A citizens' limited venture into the justice system is the hallmark by which they will judge their country and its fundamental fairness and justice. In a time when national headlines decry the increasing "lack of civility" in our courts; and various jurisdictions require lawyers to

attend ethics and professionalism seminars; the Courts should not countenance "unprofessional" conduct during a trial; not reward it, as was done herein. Trial counsel should be able to go into a courtroom and try a case without having to wallow in the mud and engage in a berating by opposing counsel, and thereby demeaning our entire justice system.

The trial bar always expects the utmost professionalism in the federal courts. This case clearly presents conduct which should not be rewarded, but should be reversed and plaintiff given a new, fair trial.

3. Whether the local practice (utilized in this case) of choosing the number of alternate jurors based upon the expected length of the trial; then converting the alternate jurors into the final jury (and not dismissing them) thereby violates the Constitutional rights of a plaintiff in requiring plaintiffs to unanimously convince a larger number of jurors based solely on the anticipated length of a trial.

The practice utilized in this District of picking a jury of six plus an additional number of jurors depending on how long the trial is expected to last and then adding any "alternates" to the full jury at the end of the case violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (Amend. V).

When a litigant must obtain a "unanimous" verdict, it is obvious that, in this day and age of independent thinking, the higher the number of jurors, the less likely one will be able to obtain a "unanimous" verdict. Why should a plaintiff who has a 3-4 week trial have to convince 3-4 more jurors (unanimously) than if the case only takes two days to try?

Civil Rule 48 on its face is unfair and

unconstitutional. It provides for a jury of six or possibly twice that number! A litigant should have a right to know how high the hurdle is going to be to clear before running the race. This vacillating number of jurors does not give fair warning to litigants and imposes a heavier burden depending on the length of your case (as determined in this District) which lacks a rationally basis. Appellant herein did object to the procedure [T.p. 2450-51].

The case sub judice was lengthy and medically complex. To try to teach and convince any more people than necessary presents a unfair and unconstitutional burden. Civil defendants would certainly welcome the imposition of a criminal conviction burden imposed on plaintiffs of unanimously convincing a dozen jurors! However, such would clearly deny many deserving plaintiffs from attaining civil justice in our society.

The practice of increasing a plaintiff's burden based purely on the length of their trial should clearly be held unconstitutional.

If the federal courts are going to increase the number of jurors from six (6); then the requirement of unanimity should be abandoned. Litigants should have the right to know before trial how many citizens they need to convince to win their case. A burden of a moving target is fundamentally unfair.

4. Is a citizen's right to their loved one's body [as recognized in Brotherton v. Cleveland, 923 F.2d 477 (1991)] violated when a state statute provides a "good faith" immunity to those involved in human tissue and organ "harvesting" when arguendo they merely ask for donation ...* * "for any purposes authorized by law"

without further explanation and they then completely remove not only the consented human body parts (corneas and inner ear bones), but further "harvest" the decedent's eyeballs; remove ten (10) sections of decedent's skin and completely remove decedent's long leg bones (femurs).

The court included in the jury instructions that the hospital "may not be held liable" if it "acted in good faith" when they exceeded the scope of anatomical gift donation.

Even taking evidence as defendant presented, there were two nurses who each individually spoke with Mrs. Gleason over the phone. The statute mandates that consent be by "a telephone call in which two persons receive THE MESSAGE." **(O.R.C. 2108.04(E))**. If there are two separate phone conversations (i.e. not a conference call), then by definition two persons cannot be sure they both heard THE same message. Contrary to Mrs. Gleason's testimony, defendant's nurses both testified rather parrot-like that Mrs. Gleason gave consent to donate **"for any purposes authorized by law."** However, both admitted neither has an understanding of what that means.

Nurse Smith testified that the "procedure" at the hospital is to fax the consent for anatomical gift to the donating person. The evidence was undisputed that the hospital faxed a consent form for an autopsy, but did NOT fax the form regarding the anatomical donations. In fact contrary to Nurse Smith, Nurse Schaze testified that she did not even "consider" faxing the anatomical gift consent form to Mrs. Gleason (even though this was the same nurse who faxed the autopsy consent form).

Further the statute assumes as a prerequisite to any "good faith" that the form is correct filled-out and the correct

information is retrieved, which if factually is not the scenario, the statutory "good faith" immunity should not be applicable.

If the "professionals" (who are obtaining alleged "consent" to take anatomical portions from a loved one's body) do not understand or know what the terms of their consent mean, how can they explain them to the alleged donor? Mrs. Gleason testified that she asked if giving the inner ear bones and corneas would affect the open-casket funeral and she was told by these same nurses it would not.

A person does have a constitutional property right in their loved one's dead body and third-parties cannot "take" that right without due process. (Brotherton v. Cleveland, 923 F.2d 477 (1991). Here, a blanket "good faith" immunity is unconstitutional under the facts of this case where defendants themselves cannot explain what their alleged "consent" means, therefore, any "consent" was not an informed consent and not valid. Clearly the vast departure from the limited consent did not warrant the blanket "good faith immunity" jury charge under the circumstances.

REASONS FOR ALLOWING THE WRIT

This was a case of serious issues; 1) federal trial evidentiary ruling abrogating substantive State law: 2) pervasive and repeated unprofessional and unethical trial conduct; 3) the constitutional issue of having a higher burden (more unanimous jurors) if your case takes longer to try; and 4) harvesting of human organs without consent.

Here a widow has expended her life-savings to pursue justice only to become a play-toy in the arena of the hard-ball players. In the federal court system this lady deserves the standards of professionalism and honor which the federal

courts engender. After all plaintiff has been through, to have the case reduced to a unethical mud-slinging contest is not what any citizen of this United States should expect as a litigant. This court can make a significant contribution to the entire area of medical negligence litigation by sending a message that this type of misconduct will not be rewarded, that this Court will not look the other way and allow injustice to prevail. Plaintiff respectfully prays this Court to grant this Writ or whatever other proper relief it deems proper under these circumstances so that this lady can have a fair trial without a jury that is inflamed with inappropriate arguments and personal attacks on counsel. This case is important not only for the Gleason family but for all other victims of medical negligence that only ask for a level playing field and the respect deserving of the federal system.

Respectfully submitted,

/s/_____
John H. Metz
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Attorney for Petitioner

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 96-3194/96/97

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
August 29, 1997
Leonard Green, Clerk

On Appeal from the United States District Court for the Southern District of Ohio

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,
Plaintiff-Appellant Cross-Appellee,

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; RHODA MCMAHON;
Defendants-Appellees,

JEFF WINHOLT, M.D.; DEACONESS HOSPITAL;
Defendants-Appellees Cross-Appellants.

/

Gleason v. Noyes, et al.
Nos. 96-3194/96/97

BEFORE: MARTIN, Chief Judge; RYAN and BATCHELDER, Circuit Judges.

RYAN, Circuit Judge. In this diversity personal-injury action, plaintiff, Barbara Gleason, appeals from a jury verdict finding no cause of action on her claims of malpractice, lack of informed consent, and negligent infliction of emotional distress brought on behalf of the estate of her late husband, William C. Gleason. Plaintiff alleges that at trial defense counsel's closing arguments were improper and prejudicial; that the trial court erred in several of its evidentiary rulings; that two of the jury instructions were incorrect; and that the trial court's method for determining the number of jurors denied the plaintiff equal protection and due process under the law. Although we think the magistrate judge who presided over this trial made several errors, none of them substantially affected plaintiff's rights or prejudiced the jury's verdict. Therefore, the magistrate judge's denial of plaintiff's motion for a new trial will be affirmed.

I.

The parties and their counsel are very familiar with the facts of the case and the procedural details that underlie the assignments of error. Therefore, there is no need to reiterate them in this unpublished opinion.

We observe, however, as a preliminary matter that there are three standards of review applicable to this appeal: de novo as to rulings of law, Miller v. Field, 35 F.3d 1088, 1090 (6th Cir. 1994), plain error as to evidentiary admissions and exclusions that were not the subject of contemporaneous

objection, Fed. R. Evid. 103(a) and (d), and abuse of discretion as to those rulings in which the magistrate judge was entitled to weigh multiple factors in making his determination, United States v. Levy, 904 F.2d 1026, 1029-30 (6th Cir. 1990). In addition, although harmless error is not a standard of review in the traditional sense, it is the criterion against which we test trial errors for unfair prejudice. See Fed. R. Civ. P. 61.

In a plain-error analysis, the affected party must show there was an error that is "clear and obvious under current law, and this error prejudicially affected the outcome of the trial. Even then, a court of appeals should exercise its discretion to reverse only when the result is a miscarriage of justice." United States v. Rodgers, 109 F.3d 1138, 1145 (6th Cir. 1997) (citations omitted). "Plain errors are limited to those harmful ones that are so rank that they should have been apparent to the trial judge without objection, or that strike at the fundamental fairness, honesty, or public reputation of the trial." United States v. Causey, 834 F.2d 1277, 1281 (6th Cir. 1987).

"'Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.'" Bowling v. Pfizer, Inc.,102 F.3d 777,780 (6th Cir. 1996) (quoting Logan v. Dayton Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989)). Harmless error is one that "does not affect the substantial rights of the parties." Fed. R. Civ. P. 61.

II.

A.

The plaintiff's first assignment of error is that she was denied a fair trial because of improper comments by defendants' counsel both in their opening and closing statements to the jury.

We have no doubt that several of the comments by defense counsel were improper. First, the attorneys personally vouched for the veracity of their clients' case and against the validity of Barbara Gleason's; they engaged in personal attacks on plaintiff's counsel; they insinuated that plaintiff's experts had fabricated their testimony; and they argued evidence which was not in the record. Second, these comments were made frequently during closing arguments. Third, many of the comments were crucial to the central issue before the jury, which was whose experts were more credible. Fourth, since Barbara Gleason offered sufficient evidence from which to conclude that her husband's death could have been prevented through different prophylactic measures, the case was close and could have been affected by defense counsel's improper conduct. Fifth, the no-cause verdicts are consistent with jury prejudice.

On the other hand, the trial court's continuing instructions and the plaintiff's failure to object to most of the matters of which she now complains mitigates the effect of defense counsel's statements. The court instructed the jury 1) to disregard any argument by the attorneys as to why any unnamed expert did not testify, 2) that the statements and

arguments of counsel were not evidence, and 3) to use their own recollection of the evidence where it conflicted with the attorneys' arguments. Most importantly, the plaintiff objected only once to any of defense counsel's inappropriate arguments, and that objection was to defense counsels benign reference to an expert-finding service, concerning whose activities there was evidence in the record. While plaintiff is correct that repeatedly objecting during defense counsel's argument could aggravate the jurors, plaintiff's counsel failed even to ask for a sidebar conference in order to draw the court's attention to opposing counsel's improper argument, or to ask the court to caution defense counsel, out of the jurors' hearing, to desist from further impermissible statements. Instead, save for one objection-and that one meritless-counsel for plaintiff did nothing.

This court has held that "[t]he determination of the extent of permissible comment and argument by counsel rests primarily in the judicial discretion of the lower court." Twatchman v. Connelly, 106 F.2d 501,509 (6th Cir. 1939).

> Indeed, whether misconduct in a trial of a cause of action is of such a nature that a fair or impartial verdict cannot be reached is in the first instance for the trial court's determination. The trial court is, of necessity, clothed with a great deal of discretion in determining whether an objectionable question is so prejudicial as to require a retrial . . . [.] The trial court is in a far better position to measure the effect of an improper question on the jury than an appellate court which reviews

> only the cold record. It is for this reason that this Court has declared that the power to set aside verdict [sic] for misconduct of counsel should be sparingly exercised on appeal . . . .
>
> In determining whether there is a reasonable probability that the verdict of a jury has been influenced by improper conduct, warranting that the verdict be set aside, a court must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e, g. whether it is a close case), and the verdict itself.

City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980) (internal quotation marks and citations omitted).

Plaintiff's failure to object precludes our review of her assignment of error under any standard other than plain error. Thus, even though it was probably "clear and obvious under current law" that defendants should not have been allowed to make some of the statements complained of, plaintiff's failure to object requires her also to show that the improper argument prejudicially affected the outcome of the trial, resulting in a miscarriage of justice. On this one issue alone, plaintiff has not met her burden. The verdict is well supported by the evidence which included expert testimony that the defendants

met the relevant standards of care. In light of plaintiffs failure to object to the defense counsel's improper comments and the abundance of evidence that the defendants were not liable for William Gleason's injuries and death, we decline to set aside the jury's verdict and order a new trial.

B.

Next, plaintiff points to six instances in which the magistrate judge allegedly erred in defendants' favor in admitting or excluding evidence. While we think the magistrate judge erred with regard to at least three of the challenged rulings, we are confident that, even taken collectively, these errors did not prejudice plaintiff's case. As we have many times observed, the parties are not entitled to a perfect or error-free trial; they are entitled to one that is fair-if imperfect-and results in a verdict supported by the properly admitted evidence. This, we think, was such a trial. The trial court's errors did not strike at the heart of plaintiffs theory of her case, and it cannot be said that correct rulings would have in any respect altered the jury's verdict.

C.

As for plaintiff's assignment of error regarding the jury instruction on intervening cause, obviously, such an argument is irrelevant. The jury found that none of the defendants' professional conduct had fallen below the appropriate standard of care in the first place; therefore, even if the instruction was erroneous, a correct instruction would have made no difference in the outcome of the trial, because the jury did not, nor did it need to, consider causation.

D.

Plaintiff's negligent infliction of emotional distress claim is grounded in an alleged violation of Ohio Revised Code § 2108.01 which regulates anatomical gifts of human bodies or body parts. Section 2108.08 provides:

> A person who in good faith acts, or attempts to act, in accordance with sections 2108.01 to 2108.12 of the Revised Code.. , is not liable for damages in any civil action ....

Ohio Rev. Code § 2108.08. Barbara Gleason contends that defendant Deaconess Hospital is not entitled to the benefit of this good-faith defense because Deaconess allegedly did not comply with the statute's other terms. Specifically, section 2108.04 requires that an anatomical gift "be made in one of the following ways: . .. (3) By a telephone call in which two persons receive the message and one of them prepares written documentation of the message, or by a telephone call that is recorded mechanically or electronically." Ohio Rev. Code § 2108.04 (emphasis added).

Barbara Gleason contends that, because the nurses who spoke with her did so consecutively, instead of simultaneously, they did not get the message as purportedly required by the statute. That is, they each got a message, but not necessarily the same one. However, plaintiff's reading does not appear to be warranted either by the plain meaning or the spirit of the statute. Two nurses made one phone call in which one nurse spoke to Barbara Gleason and then passed the phone to the second nurse, who Deaconess contends

confirmed the information recorded by the first. Both nurses spoke with Barbara Gleason, and one documented the conversation in writing. If the message had differed between nurse one and nurse two, then they probably would not have been acting in good faith if they had proceeded. The issue of good faith should have been, and was, given to the jury to decide. There was no error.

E.

Plaintiffs argument that her constitutional rights were violated by the court impaneling nine jurors and allowing each to participate in the verdict is equally meritless. Plaintiff now objects to the local practice followed by the magistrate judge of selecting six jurors plus one alternate for every week the trial was expected to last. Of the nine selected, none was specifically designated as an alternate, and none was dismissed during the course of the trial. Thus, all nine deliberated and returned a unanimous verdict. Plaintiff claims that she was forced to convince more people in a three-week trial than in a two-day trial, violating her right to equal protection. She also claims that not knowing how many jurors she would have to eventually convince violated due process.

Not only is the sole case cited for this proposition inapposite, plaintiff's position cannot logically be sustained. First, there would certainly be a rational basis for distinguishing between a two-day trial and a three-week trial in terms of the potential number of jurors who would need to be excused. Second, there is nothing fundamentally unfair about having to potentially convince six, seven, eight, or nine

jurors, when the result of convincing only the first six is not a defense verdict, but a mistrial. Certainly, the plaintiff bears the burden of proof as to all jurors. But there is no way of knowing, in a particular case or even on average, whether the last three jurors are going to be more or less sympathetic than the first six. And, as the Supreme Court has noted, increasing the number of jurors increases the reliability of verdicts. See Ballew v. Georgia, 435 U.S. 223, 232-39 (1978).

F.

Because plaintiff's assignments of error fail, we need not consider the merits of defendant Dr. Jeff Winholt's and defendant Deaconess Hospitals argument that they should have been granted judgment as a matter of law by the trial court. Resolution of the above issues in favor of all defendants renders Dr. Winholt's and Deaconess Hospitals cross-appeal moot.

III.

For the foregoing reasons, the trial court's denial of plaintiff's motion for a new trial is hereby **AFFIRMED**.

APPENDIX B

Nos: 96-3194: 96-3196: 96-3197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed: October 20, 1997

BARBARA GLEASON, AS Executrix of the Estate of William C. Gleason, Deceased, and Individually
Plaintiff-Appellant Cross-Appellee

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.;
Defendants - Appellees

JEFF WINHOLT, M.D.; DEACONESS HOSPITAL;
Defendants Appellees Cross-Appellants

RHODA MCMAHON; CRAIG ROBERTS, M.D..
Defendants Appellees

MANDATE

Pursuant to the court's disposition that was filed 8/29/97 mandate for this case hereby issues today.

Gleason v. Noyes, et al.
Nos. 96-3194/96/97

A True Copy.

No costs taxed

Attest:

Filing Fee . . . . . .$
Printing . . . . . $

Deputy Clerk

Total . . . . . $

APPENDIX C

Nos. 96-3194/3196/3197

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
October 9, 1997
Leonard Green, Clerk

BARBARA GLEASON, AS EXECUTRIX OF THE ESTATE OF WILLIAM C. GLEASON, DECEASED, AND INDIVIDUALLY,	)	**ORDER**
Plaintiff-Appellant/Cross-Appellee,	)	
v.	)	
FRANK R. NOYES, M.D., ET AL.,	)	
Defendants-Appellees,	)	
JEFF WINHOLT, M.D.; DEACONESS HOSPITAL,	)	
Defendants-Appellees/ Cross-Appellants.	)	

BEFORE: MARTIN, Chief Judge; RYAN and BATCHELDER, Circuit Judges.

Gleason v. Noyes, et al.
Nos. 96-3194/96/97

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re:	:	
		Case No. 96-108
Complaint against:	:	
		Findings of Fact,
Philip J. Marsick,	:	**Conclusions of Law, And**
Attorney Registration		**Recommendation of The**
#0018685	:	**Board of Commissioners On**
Respondent,		**Grievances And Discipline**
	:	**Of The Supreme Court**
Cincinnati Bar		**of Ohio**
Association,	:	
Relator.		

This matter came on before the Panel on the Complaint of the Relator, Cincinnati Bar Association, and the Panel consisting of Sara Lioi, J. Thomas Hentetra and Judge P. Petzold who served as Chair of the Panel. None of the Panel resides in the appellate district in which the complaint arose or the Respondent resides, and none of the Panel was a member of the probable cause panel that reviewed the Complaint.

Present for the hearing were Robert F. Laufman, Sue.

Livensparger and Edwin J. Patterson, Counsel for the Cincinnati Bar. Present on behalf of the Respondent was James N. Perry, and Respondent was likewise present.

The record notes that the Respondent is 55 years of age and was duly admitted to the practice of law in 1972 and has maintained his office in Hamilton County since that time.

The Complaint consists of three counts and the third count was dismissed at the hearing. Count One related to the conduct of Respondent in falling to disclose a report and identification of a potential witness regarding an automobile accident which had occurred in Adams County, Ohio. The subsequent litigation was filed in the United States District Court for the Southern District of Ohio, Western Division. Count Two charges that the concealment of a witness statement during discovery in this lawsuit was false and fraudulent.

FINDINGS OF FACT

On or about May 15, 1988, James Abrahamsen parked his vehicle on the side of State Route 32 because he was suffering from fatigue and he went to sleep. A truck driven by Defendant's agent, Ronald Reagan, struck the vehicle owned by Abrahamsen, killing his wife and injuring him.

Subsequent to the incident, the Defendant Reagan was interviewed by a representative of his employer's insurance carrier, and a statement was given. Reagan also made a statement to a tow truck driver on the night of the accident that he had dozed off or fallen asleep immediately prior to the

accident occurring.

A suit was filed in May of 1990 within the applicable Statute of Limitations, and the carrier transmitted the authority to represent it and Defendant Reagan in the litigation to the law firm of which Respondent was a member. Included in that file was the witness statement taken by a representative of Respondent's insurance carrier client containing the "dozed off" admission.

Discovery proceedings ensued with the Plaintiff inquiring of the Defendant through interrogatories the names, addresses, and statements regarding any persons who witnessed the accident or were involved with the incident directly or indirectly. After some months of discussion and wrangling, the proceedings arrived at an impasse, but the Respondent replied to the counsel for the Plaintiff that there were two witness statements taken, one from a truck driver who had witnessed the Defendant Reagan at one and a half to two hours preceding the incident and another from Reagan himself. No mention was made of the known statement made by the tow truck driver that was a part of Respondent's file.

A request for the discovery of the Reagan statement was made by Plaintiffs not knowing that there were any other witness statements extant.

During the course of the discovery proceedings, the Defendant Reagan reiterated at deposition and in interviews the same version as was given on the accident report taken by the police at the scene and the report filed with the Ohio Department of Transportation. Reagan testified that the

accident occurred because a deer ran in front of the vehicle he was operating causing him to take emergency action and resulting in the death of the spouse of James Abrahamsen. During the deposition of Reagan, he first stated that he did not give a statement to anyone else other than the statements that were known. Later in that deposition Reagan stated that he was so shook up, he did not know what he said to anyone, when, or how. Respondent took no action to correct the impression that no statement had been made by Reagan to anyone else. Likewise, Reagan testified at trial to the same effect, and no corrective or informative statement was made by Respondent regarding Reagan's testimony that no other statements had been given to any person.

Negotiations followed, and ultimately the case was tried resulting in the verdict in favor of the Plaintiffs in an amount of $909,880.00, apportioning Defendant's responsibility at 70 percent and that of the Plaintiff, James Abrahamsen, at 30 percent as it related to the deceased spouse.

Respondent had filed a counter-claim for the Defendant against the Plaintiffs alleging contributory negligence, and as a result of the findings, a judgment of $121,000.00 was awarded in favor of the Defendant carrier and against the Plaintiff.

Plaintiff's carrier, Nationwide Mutual Insurance Company, had not been notified of the existence of this action and the potential claim (contained in the Counterclaim) and entered the proceeding under reservation of rights. Negotiations continued while the case was on appeal from the

United States District Court to the Sixth Circuit Court of Appeals on the issue of contribution. The trial court's order allowing full contribution was affirmed on appeal in Abrahamsen v. Trans-State Express, Inc., 24 F.3d 804 (6th. Cir. 1994).

Nationwide's exposure was to the extent of a $100,000 policy limit on James Abrahamson, and there was at least a $21,000 shortfall if the finding was not reversed. During the course of these proceedings, discussions were had with the parties on behalf of Nationwide, the Plaintiffs, and the Defendants (Respondent's client) concerning potential settlement of the counterclaim, Nationwide, appearing under reservation of rights, had not agreed to pay its full amount of insurance coverage, and the Defendant carrier was insistent upon recovering the full contribution share of the judgment to offset against the claim of the decedent's next of kin. During the course of negotiations, as discussions occurred between Plaintiff's counsel and Respondent, the statement of the tow truck driver was revealed (the order of disclosure remains unclear) by Respondent.

After the conversation took place with Plaintiff's counsel Stewart, Stewart advised Kinear, counsel for Nationwide, of the existence of this statement. This added to the problems Plaintiffs counsel faced, since some prejudice may have indeed inured to Nationwide by lack of knowledge of this witness who would testify contrary to the Defendant Keagan, and would have given strength to the argument that Nationwide had been prejudiced by the lack of proper and/or timely notification. At least one conversation took place with the lawyers for the Plaintiff concerning their potential

responsibilities and indeed malpractice responsibilities for not knowing of this particular statement and in failing to notify the carrier of the claim or potential claim against James Abrahamsen.

Plaintiffs counsel filed a motion under Fed. R. Civ. P. 60(b) with the trial court alleging violations under 60(b)(3) of fraud, misrepresentation, as well as the discovery material that was not provided.

The United States District Court for the Southern District of Ohio (Judge Spiegel) indicated that under the 60(b) provision the judgment against the Plaintiff James Abrahamsen should be modified and, the other judgment vacated. Because this did not tidy up all the procedural paperwork, it was necessary for the parties to commence a Rule 59 modification judgment proceeding, and accordingly the case proceeded to the Court of Appeals with a judgment in the full amount rendered in favor of Plaintiff without the effect of any contribution or contributory negligence being involved.

The Court. of Appeals in Abrahamsen v. Trans-State Express, Inc., 92 F. 3d 425(6th. Cir. 1996) made a determination that the activities of the Respondent were sufficiently egregious and in bad faith to cause the trial court to be sustained and pointed to the following:

> The District Court found that: "...had the jury had the benefit of the information withheld by the Defendants, they would not have apportioned any liability to Mr. Abrahamsen."

> "The District Court granted the relief because Reagan's testimony, in light of the new evidence, is incredible and because had the jury known of it, Defendants' attempt to shift blame would have been unreasonable." Id. At 430.

The Court of Appeals then stated it would be proper for sanctions based on discovery fraud or subornation of perjury to be determined against Respondent and/or Respondent's client at the District Court level and remanded the proceedings for further hearing consistent with its opinion.

At the District Court level, the Respondent was then represented personally by Leo Breslin, an attorney of some forty years experience in Cincinnati, on the issue of sanctions. After much negotiation, (see Exhibits G and H of Respondent) it was agreed that the full amount of the judgment against the Defendant Reagan and the trucking company would stand and that the fees of Nationwide's counsel would be paid and that no further sanctions would issue. Exhibit G is a negotiated statement of the stipulation which seems to be couched in language directly related to the disciplinary Complaint which had been filed by the Relator prior to the resolution of the matter in the District Court. Exhibit H is an Order then relating to Exhibit G with a statement from the United States District Judge that the matter is considered resolved and that no further sanctions be taken against the Respondent. The order was duly journalized.

Messrs. Mack and Stewart, attorneys for the Plaintiff, both testified that they did not pursue the tow truck driver as

a potential witness due to the fact the Respondent had indicated there were no such other statements and that the tow truck driver was not a witness to anything that was relevant. They felt this way because of Respondent's failure to disclose the statement contained in his file.

The Respondent, on cross-examination by Relator as well as on direct examination, stated that he made the judgment, which he now believes is erroneous, that he did not have to disclose the existence of the statement from the tow truck driver. However, Respondent did not hesitate to bring the matter to the attention of the Plaintiff's lawyers when the issue of contribution and potential personal liability against them was raised.

The Panel is intrigued by the thought that if Respondent didn't think he was doing anything wrong in the first instance, why did Respondent think he was doing anything right in the second? At any rate, this disclosure at long last fueled the Motion under Fed. R. Civ. P. 60(b)(3) that ultimately led to the recasting of the jury verdict in the case in District Court. Respondent explained, first of all, that it was a credibility issue upon which he made the call. He now states that province may not have been his, and he should be conducted himself appropriately within the Federal Rules of Civil Procedure, more particularly, Rule 26. The rationale of the Respondent in not pursuing the statement or indeed considering it of material significance is that his position had been one of establishing a defense of contributory negligence found by the accident reconstruction expert (whose report the Panel did not see) and other factors that were made available to him in the course of the investigation (again, factors we did

not have the privilege of viewing.).

The file and correspondence between the Respondent and the insurance carrier's representative cast significant doubt on the Respondent's position in that regard.

There was some testimony that this case would have settled in fairly short order had there not been the failure to disclose the existence of this witness statement, and if in fact the statement's existence had been made known at an earlier point. Settlement was a likely outcome inasmuch as the parties were admittedly working on a case valued in excess of $500,000 (Plaintiffs demanding policy limits of one million), and they were less than $?5,000 apart when negotiations terminated.

The Respondent further stated that he had been subject to enough sanction and punishment as is suggested in Judge Spiegel's Order that was drafted by his counsel, Leo Breslin, and endorsed by all parties. The entry apparently was drawn to conclude the matter of the Plaintiff's case, the Nationwide Insurance Company matter, and all other sanctions and costs.

Respondent likewise, through counsel, has suggested that no state sanction could indeed be imposed as reciprocity would militate against any further sanction due to Judge Spiegel's finding that no sanction should be invoked. A reading of the District Court Rules regarding discipline of attorneys discloses that the judge shall conduct a hearing on such matters. The Panel notes with interest that no hearing was ever held, arid it is at this time that the first hearing concerning the complete nature of Respondent's conduct has

been disclosed by parties under Oath.

CONCLUSIONS OF LAW

The Panel finds by clear and convincing evidence that the Respondent has violated DR 7102(A)(3); DR 7-102(A)(7); DR 1-102(A)(4); DR 7-102(A)(5) and DR 7-109(A) as charged in Counts I and II of Relator's Complaint.

MITIGATION

Respondent by way of mitigation stated that he is 55 years of age, married, lives in Anderson Township in Hamilton County,. has a two child family, one daughter currently out of school and a son who has certain special conditions. He has been practicing with the same law rum since his graduation from Chase Law School and admission to the Bar in 1972 and has been a partner in that firm for many years. The law firm basically does litigation practice. Two letters were provided by Respondent concerning his integrity and those are Exhibits I and J. No live testimony was offered concerning Respondent.

The Panel is faced with very serious questions relating to discovery disputes. Lawyers are constantly faced with tough calls as to what is and what is not discoverable arid what is and what is not discloseable. This Panel must agree that this case presents a Gordian knot of discovery and ethical issues. Because the rules have not been clear and because the issue is clouded in the adversarial give and take of trial practice, we hasten to advise that the decision of this Panel is in no way a judgment that each and every discovery dispute

will rise to the level of an ethical violation. Respondent's rationalization and justifications for withholding the information do nothing to erase his continuing fraud and his subsequent conduct during settlement negotiations underscores the violations that the Panel found in Count 1 and Count 2 by clear and convincing evidence. The Panel finds that Relator's Motion for a directed verdict on Count 2 is now moot.

The Panel further holds that the Respondent's failure to disclose the issue in question both at the level of interrogatory discovery and thereafter by Reagan's answer at his deposition destroys any claim of credibility that he relies on. The utilization of this knowledge of that witness statement at a later point in the proceedings to affect the negotiations of a judgment to benefit his client goes beyond the pale. The Sixth Circuit Court of Appeals did not accept Respondent's arguments concerning his justification for his conduct nor do we. The Respondent was all too anxious to be willing to have this Panel accept his rationale that because of the legal gymnastics he went through, his conduct was justified.

There are appropriate procedures for disclosure, requests for protective orders, and other motions that Respondent could have made. It is not the attorney's judgment as to credibility (in this case, which was shaken somewhat by the Defendant's own statement) that should rule.

The first duty that every lawyer has from the day that the lawyer's oath is taken until the end of practice in that appellate court not of this earth is that duty as an officer of the court, and it is paramount. Both the Respondent and Mr.

Breslin, who zealously attempted to protect the interests of the Respondent, speak to that.

We note here the repeated rationalization put forth to justify the Respondent's failure to disclose the witness statement involving the establishment of an elaborate defense that turned on the Plaintiff's contributory negligence After all the details were disclosed, the Sixth Circuit Court didn't think very much of that particular rationale, and the Panel does not favor it either. If the defense of contributory negligence was so meritorius and so strong, disclosure of this witness statement would have made little, if any, difference regarding the conduct of Plaintiff. The statement of the tow truck driver related only to the conduct of the Defendant driver.

This tendency toward justification and rationalization, if not downright evasiveness, troubles the Panel. Now that all has been said and done and the Respondent is sorry for his disclosure error, we note that others have suffered. Most importantly, the justice system suffered. Respondent stated his word and his relationship with others in the profession meant a great deal to him. From this day forward, the Panel only hopes that the Respondent will put those thoughts into more complete practice than exhibited here. While this conduct may be an isolated incident, the reasons given by the Respondent indicates a tendency not uncommon in practice today. Lawyers must rise above "play-by-the-rules-as-long-as-they-are-fair-to-me." The Panel will not condone, agree with, or affirm the actions of Respondent and accepts even less so his reasons therefore. We find his conduct to be a violation of the Disciplinary Rules and recommend a public reprimand.

RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 10, 1997. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. It found the Respondent's conduct an abuse of the justice system arid a fraud on the parties to the litigation, the court and the public. Such reprehensible conduct during litigation cannot be excused or condoned and is deserving of an actual suspension from the practice of law. Accordingly the Board by unanimous vote recommends that the Respondent, Philip J. Marsick, be suspended from the practice of law in the State of Ohio for six months. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the Order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

/s/_____
Jonathan W. Marshall, Secretary
Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

THE SUPREME COURT OF OHIO

CINCINNATI BAR ASSN.	:	**1997 TERM CASE NO. 97-2257**
Relator	:	
v.	:	
PHILIP J. MARSICK, a.k.a. PHILIP JOHN MARSICK, JR,	:	**RESPONDENT'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE**
Respondent.	:	

* * * * *

Respondent hereby gives notice to the Court that the Respondent accepts the recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court and respectfully requests the Court to confirm the Findings of Fact and Conclusions and enter the recommended disciplinary order.

The Respondent will not file objections to the Findings of Fact and Recommendations of the Board.

/s/_____
JAMES N. PERRY (0001277)
Attorney for Respondent
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Cincinnati, Ohio 45202

PROOF OF SERVICE

Copies of the foregoing "Respondent's Response to the Courts Order to Show Cause" was served by ordinary U.S. Mail on the following this 24th day of November, 1997:

(1) Robert F. Laufman
Attorney at Law
1409 Enquirer Building
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Cincinnati, Ohio 45202

(2) Sue Livensparger
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(3) Jonathan W. Marshall
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/s/_____
JAMES N. PERRY (0001277)
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